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In The

Supreme Court of the United States

October Term, 1971
No. 71-237

VINCENT R. MANCUSI, Warden of Attica Correctional Facility,

Petitioner,

vs.

WILLIAM C. STUBBS,

Respondent,

On Writ of Certiorari to the United States Court of Appeals, for the Second Circuit

BRIEF OF THE DISTRICT ATTORNEY OF MONROE COUNTY, NEW YORK, AS AMICUS CURIAE

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By consent of the petitioner and respondent herein, the District Attorney of Monroe County, New York, files this brief as *amicus curiae.*

Interest of the *amicus curiae*

Respondent herein, petitioner-appellant below, was convicted in Monroe County, New York, and sentenced by that County's Court. The decision and order below directly affect the sentence imposed.

POINT I

Imposing a Federal "hearsay rule" on the States is unnecessary in view of the due process clause, and is burdensome to the State Courts.

We believe this case presents issues far beyond our specific interest, and far beyond the specific interest of respondent.

The facts are set out in the brief of petitioner in chief, and in the majority opinion below (442 F. 2d at 562).

In *Pointer v. Texas,* 380 U.S. 400, 85 S. Ct. 1065 (1965), this Court specifically made the Sixth Amendment's "right to confrontation" obligatory on the States through the Fourteenth Amendment.

Such rule if strictly and technically applied hampers the States both in individual prosecutions, and in formulating procedural rules to cope with the changing times and conditions.

We respectfully ask the Court to review the holding in *Pointer,* and to restore the "due process" rule as controlling in matters of trial evidence.

The right to confront witnesses is a Constitutional safeguard against anonymous accusers; it is not and should not be co-extensive with the right to have the witness present in the courtroom.

Respondent Stubbs was tried and convicted in Tennessee. His appeal, including the issue of the transcript's introduction, was heard by Tennessee's highest court. They affirmed unanimously. *State v. Stubbs,* 216 Tenn. 567, 393 S.W.2d 150 (1965).

Nevertheless, the majority below concluded that Stubbs had not had a fair trial because the witness Holm was not present in court at the second trial, and therefore Stubbs had not been confronted by the witnesses against him. This in face of the fact that Mr. Holm was present at the first trial and was fully cross examined by Stubb's counsel there.

In relying on *Barber v. Page* 390 U.S. 719, 88 S. Ct. 1318 (1968), the majority below pointed out that the Tennessee prosecutor had made no effort to induce Holm to voluntarily return to Tennessee, and therefore the transcript was improperly read into evidence. The facts in *Barber* are easily distinguishable from the present case. Not only was the witness then in prison only a few hundred miles away, easily available to judicial process, but the witness had never been effectively cross-examined.

Were this case being decided on a "due-process" theory, then there would be a narrow issue to decide: how hard does a prosecutor have to chase a witness who has left the United States before he can use the prior testimony of this witness. At the very least, more weight should have been given the Tennessee decision.

However, since *Pointer,* due process takes a back-seat to confrontation. Since each State is now bound to the Federal definition of confrontation, all the local rules of evidence, and all the judicial decisions dealing with hearsay in the State Courts are valueless in a Federal habeas corpus hearing.

Federal Courts are not bound by State Court interpretations of Constitutional questions. *Brown v. Allen;* 344 U.S. 443, 73 S. Ct. 397 (1953); *Fay v. Noia,* 372 U.S. 391, 83 S. Ct.

822 (1963). Therefore, anyone convicted at a trial where there was even a question of hearsay testimony is entitled to a hearing in a Federal Court after he exhausts his appeals in the State Courts based on *Pointer*. Our major concern is not with the court congestion and loss of judicial time these hearings may cause. Our worry is that controlling law in these hearings will be Federal case law, used to determine validity of State trials.

We understand that by necessity, this Court must, from time to time, establish new precedent, or break new ground. When such decisions are episodic and deal with either procedural or substantive rights, then there is a temporary dislocation of one segment of society in favor of another. This is necessary in a free society and merely represents the push and pull of diverse societal groups. Here, however, we are dealing with an evidentiary question, which affects the very essence of any trial.

Imposing a rigid rule on the several states can have a stultifying effect. The present case is an excellent example of the potential mischief a superimposed Federal rule, rigidly imposed, can cause.

The Tennessee Constitution, Art. I, sec. 9 grants to every accused the same rights as does the Sixth Amendment with respect to confronting witnesses. The Tennessee Supreme Court found Stubbs had a fair trial, and the Second Circuit found he did not. Presumably, the trial judge understood his State's rules of evidence. Had he known a different rule might be used several years later to review his decision he might have required the prosecutor to make a better record.

The answer to the problem we feel is to apply the Fourteenth Amendment "due process" test without specific

reference to the Sixth Amendment. See the concurring opinion of the late Justice Harlan, in *Pointer v. Texas,* 380 U.S. at 408, 85 S. Ct. at 1070.

This will not limit the availability of habeas corpus relief in any way. What it will do, is allow the states to experiment, and to change their rules with the changing times and conditions.

In *California v. Green,* 399 U.S. 149, 90 S. Ct. 1930 (1970), the California Supreme Court reversed a lower State Court on the grounds that the introduction of a prior statement in evidence was a violation of the Confrontation Clause, even though California statutes specifically permitted the procedure followed in the trial court. This Court reversed. The specific holding is not relevant to our case, except that it points up the difficulties of trying to reconcile State and Federal rules. See the separate concurring opinions of the Chief Justice, and Justice Harlan.

In discussing the applicability of certain elements of the Bill of Rights to the states, Justice Cardozo said in *Palko v. Connecticut* (302 U.S. 319, 58 S. Ct. 149 (1937)) that the Fourteenth Amendment would require application of those rights which were "**** found to be implicit in the concept of ordered liberty ***." (302 U.S. at 325, 58 S. Ct. at 152).

The specific holding as well as the dicta in *Palko* has since been reversed. However, we hope the logic of the phrase just quoted has not been discredited.

Since this Court has told us that not all hearsay was intended to be excluded (*Dutton v. Evans,* 400 U.S. 74, 91 S. Ct. 210) we see no reason to specifically impose the Confrontation Clause on the states, when the due process clause of the Fourteenth Amendment will serve the same purpose, with more flexibility.

POINT II

Respondent's confrontation right was not violated by the introduction into evidence of an earlier sworn statement by a witness residing out of the United States.

The majority below was apparently troubled by the non-appearance of the witness Holm, even though he was then known to be a resident of Sweden, and beyond the jurisdiction of any court in this country. It therefore held, following *Barber v. Page*, 390 U.S. 719, 88 S. Ct. 1318 (1968), that the prosecutor did not make a great enough effort to induce Mr. Holm to voluntarily return to Tennessee.

We feel that the rationale behind *Barber* is not applicable to the case of a witness completely beyond the court's jurisdiction.

We fully support the position of the Attorney General of New York on this point. In the event our argument in Point One is not persuasive, then we feel reversal is required on the facts and the argument of the Attorney General.

POINT III

Sworn testimony, subject to cross examination satisfies the hearsay rule; demeanor evidence is not required in all cases.

In addition to the arguments advanced by the Attorney General of New York, we ask the Court to consider the distinction made by Dean Wigmore between the right to cross examine and the right to have the witness present in the courtroom (Wigmore on Evidence, §1395-97, 3rd Ed., 1940).

The right to confront the adverse witnesses was designed to avoid anonymous accusations, and trial by affidavit. However, once the witness is cross examined under oath, then the confrontation rule is satisfied. The remaining right—to have the fact trier view the witness—is not an absolute, and may be dispensed with. This right was referred to as demeanor evidence by Dean Wigmore.

We believe that no violence was done to respondent's rights by dispensing with the demeanor evidence in this case, since the witness was fully cross examined at the first trial, the transcript of which was introduced at the second trial.

Respectfully submitted,

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